CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 106

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

vs.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MAY 26 1930

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1 In the United States District Court, District of Arizona

No. L.-599-PHX.—At Law

I. B. KOCH, PLAINTIFF,

vs.

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE, DEFENDANT.

2 *Complaint*

Filed Oct. 15, 1928

To the honorable the Judges of the District Court of the United States for the Distric of Arizona:

Comes now the plaintiff I. B. Koch, and for cause of action herein alleges:

I

That plaintiff is and at all the times herein mentioned was a citizen of the United States of America and of the State and district of Arizona, residing at Flagstaff in the county of Coconino in said State and district of Arizona. That the defendant is the duly appointed, qualified and acting collector of internal revenue for the district of arizona, residing in the city of Phoenix, county of Maricopa, in said State and district of Arizona.

II

That the acts and conduct on the part of the said defendant hereinafter complained of were done by him in his official capacity, under instructions from his superior officers. There was probable cause for his conduct, and he is entitled to a certificate of probable cause in the event judgment is rendered against him herein.

III

That for more than fifteen years plaintiff and Margaret E. Koch have been husband and wife, and during all of said period plaintiff and his said wife have continuously maintained and now
3 maintain the marriage relation, and have continuously during said period lived in the State of Arizona and have been citizens thereof. Neither the plaintiff nor his said wife had any property at the date of their marriage, and neither has since acquired any property by gift, devise, or descent.

IV

That by their joint efforts plaintiff and his said wife had, prior to the calendar year 1927, accumulated certain bank deposits, notes,

and corporate stocks, from which during said calendar year 1927 they received interest in the amount of $42.45, and which said bank deposits, notes, and corporate stocks at all times stood in the name of plaintiff.

V

That in the calendar year 1927, plaintiff was in the employ of the Arizona Lumber & Timber Company at Flagstaff, Arizona, as manager of the business and affairs of said Arizona Lumber & Timber Company, and as such received a salary from said Arizona Lumber and Timber Company during said calendar year of 1927 amounting to $12,000.00.

VI

That neither the plaintiff nor the said Margaret E. Koch had or received any other income or revenue from any source during said calendar year 1927, nor was there any other revenue or income due or payable plaintiff or said Margaret E. Koch from any source during the said calendar year 1927.

VII

4 That plaintiff paid from said community funds in the year 1927 the following sums, which he alleges constitute allowable and proper deductions in the calculation of net income under the revenue act of 1926:

Contributions to Catholic church	$250.00
Wear and tear on automobiles and miscellaneous expense	200.00
Taxes	56.54
That these expenses so paid total	$506.54

VIII

That plaintiff and his wife each filed with the defendant at the time required by law income-tax returns for the year 1927, in a faithful and bona fide effort to report their said income, and all their income-tax liability thereon, as required by the revenue act of 1926. That in so doing each reported the entire amount of the interest and salary received by the plaintiff as above set forth, and deducted therefrom the expenses and allowances above itemized, and each reported as net taxable income one-half of the remaining sum. The gross income so reported was $12,042.45, the deductions totaled $506.54, leaving a balance of $11,535.91, of which each reported one-half, or $5,767.96, as their respective net incomes.

IX

That the tax liability of the plaintiff and his said wife, upon the income so reported by them at the rates provided by the revenue act of 1926, was $45.81 each, and each of them has paid the said sums at the time required by law to the defendant.

X

That after the plaintiff had filed his income tax return for the calendar year 1927 as above set forth, said return was audited and examined by the Commissioner of Internal Revenue, who determined that the plaintiff's said tax return was incorrect, and that the tax liability shown therein was insufficient in that, as determined by said Commissioner of Internal Revenue, all of said income, both that reported by the plaintiff and that reported by his said wife, should have been reported by the plaintiff and the tax calculated by the rates provided for by the revenue act of 1926, upon one net income of $11,535.91, instead of two net incomes of $5,767.96 each. Said commissioner notified the plaintiff by registered mail of this determination in accordance with section 274 of the revenue act of 1926, and that he proposed to assess against him a deficiency in income tax for the year 1927, on account thereof, amounting to $102.06.

XI

That the plaintiff waived the opportunity afforded him to appeal from said determination to the United States Board of Tax Appeals, and thereafter, in October, 1928, the said sum, with interest in the sum of $3.26, making a total of $105.32, was assessed against him by said commissioner and the assessment certified to the defendant for collection, who thereupon made formal notice and demand upon plaintiff for the payment of said sum.

XII

That plaintiff paid to the said defendant on October 9, 1928, the sum so demanded of him, and at the time of said payment protested in writing against the collection of said sum and notified the defendant that the said sum was paid only to avoid the imposition of further penalties and interest, and the seizure and sale of plaintiff's property which would result if the said sum were not paid.

Thereafter the plaintiff filed with the defendant a claim for the refunding of said sum in the manner required by law, which claim was based upon the facts and claims herein set forth, and this claim was rejected by the Commissioner of Internal Revenue on October 10th, 1928.

XIII

Plaintiff alleges that all of the income so reported by him and his said wife for the calendar year 1927 was their community income and property under the laws of the State of Arizona and belong jointly and equally to them, and that he is not subject to taxation under the revenue act of 1926 upon his said wife's one-half of said community income, and that the action of the Commissioner of Internal Revenue in adding to the income so reported by him the share of said community income received and reported by his wife was illegal and erroneous, and likewise the assessment and col-
7 lection of said additional sum as tax and interest for the year 1927 was improper, illegal, and erroneous, and contrary to the terms and provisions of the revenue act of 1926.

XIV

Plaintiff further alleges that the effect and result of the acts and conduct of the defendant in demanding and collecting from plaintiff a tax upon his income plus that of his said wife is to levy and collect a tax upon something not within the meaning of the term "income" as it is used in the sixteenth amendment to the Constitution of the United States.

XV

That the exaction and collection of the said sum heretofore referred to by defendant deprives plaintiff of his property without due process of law, in violation of the fifth amendment to the Constitution of the United States.

XVI

That the revenue act of 1926, if by its terms it provides for and requires that the income from the property of plaintiff and his said wife be taxed in the manner and amount exacted of plaintiff by the collector of internal revenue is as to this plaintiff unconstitutional and void, in that:

(a) It requires the collection from plaintiff of a tax based in whole or in part upon the income of the said Margaret E. Koch.

(b) It requires the collection from plaintiff at progressive rates of a tax, based not upon his income alone but upon the com-
8 bined incomes of plaintiff and the said Margaret E. Koch, thereby not only obliging plaintiff to pay upon an income not his own but obliging him to pay at a higher rate upon his own income.

(c) It forbids and prohibits plaintiff and Margaret E. Koch from filing separate income tax returns, including therein the income only belonging to and received by them respectively, which right is allowed under the revenue act to citizens of the United States.

(d) It is arbitrary and capricious in that it uses as a basis and as the subject of a tax assessed against and collected from plaintiff at progressive rates the combined incomes of himself and the said Margaret E. Koch, instead of the income only of plaintiff.

(e) It provides for the taking of the property of the plaintiff without due process of law and denies to him the equal protection of the law, in violation of the fifth and sixteenth amendments to the Constitution of the United States.

XVII

That because of the facts herein alleged plaintiff is entitled to have and recover from the defendant the tax and interest so paid, together with interest thereon as provided by law.

Wherefore, plaintiff prays for the issuance of citation to the defendant, and that upon final hearing hereof he have judgment against
9 defendant for the tax and interest so paid, amounting to $105.32, together with interest thereon from the date of payment at the rate of six per cent per annum and all costs of suit; that there be issued by the Court a certificate of probable cause for the conduct of defendant in his official capacity as aforesaid, and that plaintiff have such other and further relief as he may be entitled to.

ELLIOTT & SHIMMEL,
CURLEY & PATTEE,
Attorneys for Plaintiff.

In United States District Court

Summons and marshal's return

Filed Oct. 16, 1928

Action brought in said District Court and the complaint filed in the office of the clerk of said District Court in the city of Phoenix, and county of Maricopa.

The President of the United States of America, greeting, to Fred O. Goodell, Collector of Internal Revenue, Defendant:

Action brought in said District Court and the complaint filed in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within twenty days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer
10 as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the court for any other relief demanded in the complaint.

Witness the honorable F. C. Jacobs, judge of said district court, this 16th day of October, in the year of our Lord one thousand nine hundred and twenty-eight, and of our Independence the one hundred and fifty-third.

[SEAL.]

C. R. McFALL,
Clerk.
By M. R. MALCOLM,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE,
District of Arizona.

I hereby certify that I received the within writ on the 16 day of Oct., 1928, and personally served the same on the 16th day of Oct., 1928, upon Fred O. Goodell, collector of internal revenue, by delivering to, and leaving with Roy Dadison as asst. collector of internal revenue, said defendant named therein personally, at the city of Phoenix, county of Maricopa, in said district, a certified copy thereof, together with a copy of the complaint, certified to by C. R. McFall attached thereto.

G. A. MAUK,
U. S. Marshal.
By J. W. MCCORMICK,
Office Deputy.

Oct. 16, 1928.
[File endorsement omitted.]

11 In United States District Court

Demurrer

Filed Dec. 19, 1928

Comes now the defendant above named, by the United States attorney, and demurs to plaintiff's complaint, on the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant.

Wherefore defendant prays that said complaint be dismissed and that plaintiff take nothing thereby and for costs.

JOHN B. WRIGHT,
United States Attorney.
By B. E. MARKS,
Assistant United States Attorney.
THOMAS H. LEWIS, JR.,
Special Assistant to the Attorney General.

Received copy of above this 19th day of December, 1928.

ELLIOTT & SHIMMEL,
CURLEY & PATTEE,
Attorneys for Plaintiff.

12 In United States District Court, District of Arizona

No. L.–599—Phoenix

I. B. KOCH, PLAINTIFF
vs.
FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Judgment

Filed Mar. 20, 1929

This cause came on for hearing before the above-named court on the 19th day of December, 1928, upon the demurrer of the defendant to the plaintiff's complaint and was argued by counsel for the respective parties. And arguments in writing were subsequently submitted the court and the cause taken under advisement. Thereafter, and on the 6th day of February, 1929, the court being fully advised in the premises, did order that the defendant's said demurrer be overruled. And the defendant, not desiring to plead further but electing to stand upon his said demurrer, it was thereupon ordered that judgment be entered in favor of the plaintiff as prayed in the complaint.

Now, therefore, pursuant to said order for judgment, it is by the court,

Ordered, adjudged, and decreed that the plaintiff, I. B.
13 Koch, do have and recover of and from the defendant Fred O. Goodell, collector of internal revenue, the sum of one hundred five and 32/100 ($105.32), together with interest thereon at the rate of six per cent per annum from the 31st day of October, 1928, until paid.

And it is further ordered, adjudged, and decreed that the said plaintiff do have and recover of and from said defendant the costs of this action, taxed at the sum of $12.00.

And it further appearing from said complaint that this action is brought against the defendant in his official capacity as collector of internal revenue to recover a sum of money assessed and collected as a further and additional income tax for the year 1927, and that in so assessing and collecting the said tax the defendant acted with probable cause for so doing: Now, therefore, it is

Ordered, adjudged, and decreed that in making such assessment and collection of said tax, recovery for which is sought in this action, the said defendant, though in error in so doing, acted in good faith and with probable cause, and that a certificate to that effect be issued.

Done in open court this 20th day of March, 1929.

F. C. JACOBS,
United States District Judge for the District of Arizona.

14 In United States District Court

Præcipe for transcript of record

Filed Mar. 29, 1929

To the clerk of the above-entitled court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal heretofore allowed by said court, and include in the said transcript the following pleadings, proceedings, and papers on file, to wit:

I. Complaint.
II. Summons.
III. Demurrer.
IV. Judgment.
V. This præcipe.
VI. Clerk's certificate.
VII. Petition for appeal.
VIII. Order allowing appeal.
IX. Notice of appeal and waiver.
X. Bill of exceptions.
XI. Assignment of errors.

Dated this 29th day of March, A. D. 1929.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Asst. United States Attorney.

15 ACCEPTANCE OF SERVICE

Acceptance of service of the foregoing præcipe was hereby accepted this 29th day of March, A. D. 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

In United States District Court

Petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit

Filed Mar. 29, 1929

To the Honorable F. C. Jacobs, Judge of the District Court of the United States for the District of Arizona:

The above-named defendant, through his attorney, Lemuel P. Mathews, Assistant United States Attorney for the District of Arizona, conceiving himself aggrieved by the order and judgment made and entered on the 20th day of March, A. D. 1929, in the above-entitled cause, does hereby appeal from the said order and judgment to the

United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed and that a
16 transcript of the record, proceedings, and papers from which said order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Asst. United States Attorney.

The foregoing claim of appeal is allowed.
Dated at Phoenix, Arizona, this 29 day of March, A. D. 1929.

F. C. JACOBS,
United States District Judge.

(Endorsed:) Received copy of the within this 28th day of March, 1929.

ELLIOTT & SHIMMEL,
CURLEY & PATTEE,
Attorneys for Plaintiff.

In United States District Court

Order allowing appeal

Filed Mar. 29, 1929

At chambers before the Honorable F. C. Jacobs, United States district judge, the following proceedings were had:

In this cause, on motion of counsel for the defendant, and it appearing to the court that the above-named defendant has here-
17 tofore filed its petition for the allowance of an appeal, and concurrently therewith its assignment of errors:

It is ordered that an appeal for the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment in this cause, made and entered on the 20th day of March, A. D. 1929, be and the same is hereby allowed to said defendant, and

It is further ordered that the transcript of the record, proceedings, and papers, which will be transmitted by the clerk of this court, to the said United States Circuit Court of Appeals for the Ninth Circuit, be treated, considered, and duly authenticated as a transcript of the record, proceedings, and papers upon which this appeal is based, and transmitted to said United States Circuit Court of Appeals for its consideration in connection with said appeal.

F. C. JACOBS,
United States District Judge.

Received copy of the within this 28th day of March, 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

18 In United States District Court

Notice of appeal and waiver

Filed March 29, 1929

To judge and clerk of above-entitled court and to attorneys for plaintiff, Messrs. Elliott & Shimmel, Curley & Pattee:

You will hereby take notice that the defendant in the above-entitled case hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, on the order and judgment made and entered herein on the 20th day of March, A. D. 1929, overruling defendant's demurrer, wherein the defendant elected to stand upon the same, and the judgment entered by the court in favor of the plaintiff and against the defendant, as more fully appears in the assignment of errors herein filed.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Asst. United States Attorney,
Attorney for Defendant.

The plaintiff above, I. B. Koch, acknowledges the receipt of notice of the filing of the petition for appeal herein, the allowing of said appeal, the assignment of errors, and now comes freely into court and avers there is no error in the record in this proceeding nor in the judgment rendered therein, and plaintiff prays that the United States Circuit Court of Appeals for the Ninth Circuit may proceed to examine the record in this proceeding, as aforesaid, as to all
19 matters assigned for error herein, and that the judgment aforesaid and forms aforesaid given may be in all things affirmed, and the said plaintiff hereby waives the necessity of defendant furnishing bond on appeal, and the issuing and service of citation or other process herein, and hereby enters the appearance of plaintiff in the appeal herein taken.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

(Endorsed:) Received copy of the within this 28th day of March, 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

In United States District Court

Bill of exceptions and order settling same

Filed March 29, 1929

This cause came on for hearing before the Honorable F. C. Jacobs, judge of the District Court of the United States for the District

of Arizona, attorneys for plaintiff and defendant being present and the following proceedings were had, to wit:

"DEMURRER

Comes now the defendant above named, by the United States attorney, and demurs to plaintiff's complaint, on the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant.

20 Wherefore, defendant prays that said complaint be dismissed and that plaintiff take nothing thereby and for costs."

After consideration of said demurrer, the court overruled the same in the following language, to which the defendant excepted:

"The defendant's demurrer having been heretofore taken under advisement, and the court having duly considered the same, and being fully advised in the premises, does now

Order, adjudge, and decree that said demurrer be, and it is hereby overruled, to which ruling of the court the exception of the defendant is allowed."

And now come in furtherance of justice and that right might be done, the defendant tenders and presents the foregoing as his bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed, and sealed by the court and made a part of the record, and the same is accordingly done this 29th day of March, A. D. 1929.

F. C. JACOBS,
Trial Judge.

(Endorsed:) Received copy of the within this 28th day of March, 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

21 In United States District Court

Assignment of errors

Filed March 29, 1929

The defendant, Fred O. Goodell, collector of internal revenue, by Lemuel P. Mathews, assistant United States attorney for the District of Arizona, makes the following assignment of errors, which it avers occurred at said hearing, and prays for a reversal of the order and judgment as prayed for in his petition upon appeal:

1st. The court erred in overruling defendant's demurrer, on the ground that said complaint did not state facts sufficient to constitute a cause of action against the defendant.

2d. The court erred in holding that the husband and wife could make and render separate income-tax reports upon the community interests.

3d. The court erred in not dismissing the plaintiff's complaint.

Wherefore, the defendant prays that the said order and judgment be reversed.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Asst. United States Attorney.

Received copy of the within this 28th day of March, 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorney for Plaintiff.

22–23 And I further certify that the fees charged by me as constructive earnings against the United States for the preparation of this record amount to the sum of six and 55/100 dollars ($6.55).

[Clerk's certificate to foregoing transcript omitted in printing.]

25 In United States Circuit Court of Appeals, Ninth Circuit

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE, Appellant vs. I. B. KOCH, APPELLEE	No. 5794

Order of submission

Oct. 21, 1929

Ordered appeal in above cause argued by Mr. T. H. Lewis, jr., special attorney, Bureau of Internal Revenue, counsel for appellant, and by Mr. Blaine B. Shimmel, counsel for the appellee, and submitted to the court for consideration and decision.

26 In United States Circuit Court of Appeals

[Title omitted.]

Order directing filing of certificate certifying certain questions or propositions of law to the Supreme Court of the United States

April 28, 1930

By direction of the Honorable Frank H. Rudkin, Frank S. Dietrich, and Curtis D. Wilbur, circuit judges, before whom the cause was heard, ordered certificate certifying certain questions or propositions of law to the Supreme Court of the United States under section 239 of the Judicial Code be filed, and that a certified copy of said certificate be forthwith forwarded by the clerk of this court to the clerk of the Supreme Court of the United States.

27-28 [Certificate to Supreme Court omitted in printing, as it appears under separate cover.]

29 [Clerk's certificate to foregoing transcript omitted in printing.]

30 SUPREME COURT OF THE UNITED STATES

Order granting motion to bring up entire record and cause

May 26, 1930

On consideration of the joint motion for a writ of certiorari to bring up the entire record and cause,

It is now here ordered by this court that the said motion be, and the same is hereby, granted.

[Indorsement on cover:] File No. 35013. Supreme Court U. S. October term, 1929. Term No. 106. Fred O. Goodell, Collector, vs. I. B. Koch. Certified copy of transcript of record. Filed May 19, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930